Fantasia Fresh Juice Company *and* Manufacturing, Production & Service Workers Union Local 24, I.U.A.N.&P.W., AFL–CIO. Cases 13–CA–38526 and 13–RC–20319

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On February 12, 2001, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel and Charging Party Union filed exceptions and supporting briefs and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

1. We do not rely on the judge's finding that employee Ruiz "testified inconsistently" about the details of an April 28, 2000 meeting. We affirm, however, the judge's ultimate determination in crediting the testimony of the Respondent's officials, Tom Hicks and Brad Barnhorn, that employees at this meeting were only asked generally if they had ever been members of a union before. In the context of the overall discussion, which included a comparison of the Respondent's existing benefits with those that might be found in a union setting, we find that the General Counsel has failed to establish that the Respondent's query was other than rhetorical and noncoercive. We therefore affirm the judge's finding that statements made at this meeting did not violate Section 8(a)(1). See generally *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Contrary to the dissent, we have applied the proper objective standard in finding under *Rossmore House* that employees would reasonably understand the noncoercive comparative context in which the question about prior union affiliation was posed. Furthermore, we find that the dissent misstates Board law by suggesting that an otherwise noncoercive interrogation under *Rossmore House* is nevertheless unlawful if an employer fails to give explicit assurance against reprisal.

2. Our dissenting colleague also challenges the failure to find that the Respondent violated Section 8(a)(3) of the Act by denying Simeon Henriquez reinstatement in accord with his rights as a former economic striker. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert denied 397 U.S. 920 (1969). The General Counsel has not filed exceptions to the judge's express finding that this is not a *Laidlaw* case. In accord with the Board's well-settled practice, our review of the judge's decision is limited to the issues raised by the exceptions. See *FES*, 333 NLRB 66 fn. 1 (2001).[2]

Moreover, even assuming that the issue of a *Laidlaw* violation were raised to us by exceptions, we would find that the issue has not been fully litigated. At all times in this proceeding, the General Counsel has argued only that Henriquez and his fellow strikers were unfair labor practice strikers entitled to immediate reinstatement upon their unconditional offer to return to work. In its defense to *this* allegation, the Respondent has argued only that the strike was an economic strike and that, in any event, Henriquez was properly denied reinstatement because of misconduct. The judge has found that Henriquez did not engage in misconduct but that he was an economic striker. Both we and our dissenting colleague have affirmed the judge on this point. Beyond that, the Respondent had no notice that it needed to present any further defense that would justify failing to offer immediate reinstatement to an economic striker, but would lack any legal merit as to an unfair labor practice striker. The issue has therefore not been fully litigated.[3]

Our colleague relies on *Rogers Mfg. Co.*, 197 NLRB 1264 (1972), enfd. 486 F.2d 644 (6th Cir. 1973). However, in that case, as the court noted, the respondent "had adequate notice of the matters in issue" and thus those matters were "fairly tried." That is not the case here.

ORDER

The recommended Order of the administrative law judge is adopted, the complaint in Case 13–CA–38526 is dismissed, and Case 13–RC–20319 is severed and remanded to the Regional Director for further appropriate action in accordance with the judge's decision.

[1] The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We have no quarrel with our dissenting colleague's statement that the absence of an exception does not bar the Board's exercise of its remedial authority. There must, however, be an unfair labor practice to remedy. The judge expressly found no *Laidlaw* violation, and the absence of exceptions directly on point *is* dispositive here, even if, as the dissent claims, the issue had been fully litigated.

[3] We do not pass on the issue of whether the Respondent threatened retaliation for use of Board processes, in violation of Sec. 8(a)(4). The matter was neither alleged nor litigated.

MEMBER LIEBMAN, dissenting in part.

I disagree with my colleagues with respect to two issues and also write separately to point out a third concern. First, I would find that the Respondent violated Section 8(a)(1) of the Act during a mandatory meeting held immediately after it received the Union's demand. Second, I would find that the Respondent was required to offer reinstatement to Simeon Henriquez after the strike. Finally, I observe that although the issue was not litigated and so properly not reached by the Board, the evidence suggests that the Respondent violated Section 8(a)(4) of the Act by threatening retaliation for using the processes of the Board.

1. At the mandatory meeting, the Respondent's president, Tom Hicks, admittedly "asked if anybody in the room had ever been in a union before . . . . And then I [Hicks] went around, I said, have you ever been in a union and there was only one person that said yes." Hicks asked that employee about his union experience.

On the basis of the subsequent discussion, the judge found, and my colleagues agree, that Hicks asked whether employees had been union members solely "in order to compare that experience with the benefits already afforded by Respondent." Consequently, in their view, the question was lawful.

However, in the mandatory group setting imposed by the Respondent, Hicks' question as to past union affiliation was unlawfully coercive regardless of his intent. It is settled law that whether an employer's action is unlawfully coercive does not depend on the employer's motive, but on whether the action may reasonably tend to interfere with the free exercise of Section 7 rights. E.g., *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999). The Board has also noted that with respect to interrogations on the subject of unions, questioning in a group as opposed to individual setting may enhance the coercive impact, "as the questions thus put every employee on the spot." Id.

It is also well established that an employer who interrogates employees concerning union involvement or other protected activity must give them explicit assurance that no reprisal will follow their response. *Multi-Ad Services*, 331 NLRB 1226, 1229 (2000); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339,1344–1345 (2000); *Fairprene Industrial Products Co.,* 292 NLRB 797, 797 (1989); *Preterm, Inc.,* 240 NLRB 654, 656 (1979).[1]

My colleagues, relying on *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), suggest that whenever an employer engages in an "otherwise noncoercive" interrogation concerning employees' union sympathies or affiliations, the Board will not find that the failure to give an explicit assurance against reprisal makes the interrogation unlawful. An otherwise noncoercive interrogation might, under some circumstances, be lawful even absent such an assurance. However, our cases have clearly indicated that an employer who declines to provide an assurance during an interrogation runs a strong risk of being found in violation of Section 8(a)(1). E.g., *Multi-Ad Services,* supra; *Yoshi's Japanese Restaurant*, supra; *Seda Specialty*, supra at 352; *Hertz Corp.,* 316 NLRB 672, 684 (1995); *Laidlaw Waste Systems, Inc.,* 305 NLRB 30, 32 (1991); *Blue Flash Express, Inc.,* 109 NLRB 591, 592–594 (1954).[2] In any event, I do not agree that the interrogation was "otherwise noncoercive." Thus, omission of that assurance is particularly critical here where the interrogation occurs at a mandatory meeting; the employees interrogated are not already known to be union-affiliated; and the questions asked would elicit precisely which of them have had such affiliations. In short, even if I agreed that the interrogation here was "otherwise noncoercive," which I do not, I would find it unlawful.

In this case, the Respondent admittedly summoned its employees to a meeting and "went around" the group, asking each employee if he had been a union member in the past. Even if no other coercive questions were asked, as the judge found, this question put each employee "on the spot" while clearly communicating that the Respondent strongly disapproved of unions. Moreover, the Respondent gave no assurance, then or later in the discussion, that employees would not suffer reprisal for their response. Accordingly, even if the discussion continued solely on the subject of comparative benefits, the question tended to interfere in the exercise of Section 7 rights and was unlawfully coercive.

2. I also cannot agree that the Respondent's refusal to offer reinstatement to Simeon Henriquez, after a strike, was lawful.[3]

[1] In *Seda Specialty Packing Corp.*, 324 NLRB 350 (1997), cited by the Respondent, the employer gave the employees who were questioned repeated assurances that there would be no retaliation. Id. at 352. The case is therefore inapposite.

[2] As noted in *Corporate Express Delivery Systems*, 332 NLRB 1522, 1531 (2000), whether the employer gave assurance against reprisal is also a factor applied by at least two U.S. Courts of Appeals in determining whether an interrogation is coercive. *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 928 (5th Cir. 1993); *NLRB v. Brookshire Grocery Co.,* 919 F.3d 359, 366 (5th Cir. 1990).

[3] I agree with my colleagues that, for the reasons stated by the judge, the strike was not an unfair labor practice strike. Like my colleagues, I also do not rely on the judge's finding that David Ruiz's testimony

Henriquez was permanently replaced during the strike and later denied reinstatement on the ground that during the strike he allegedly lifted a rock and made as if to throw it through the plant manager's windshield. The judge, however, specifically found from the credited evidence that the rock incident "never happened." Under well-established law, the employer was consequently required to offer Henriquez reinstatement when a suitable vacancy occurred. *Baddour, Inc.*, 303 NLRB 275 (1991); *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert denied 397 U.S. 920 (1969).

In the judge's view, however, "[t]his is not a *Laidlaw* case" because the General Counsel had alleged that the strike was an unfair labor practice strike, rather than an economic strike to which *Laidlaw* rights apply, and sought reinstatement for the strikers only on that premise. My colleagues agree with the judge that the Board is consequently barred from imposing a *Laidlaw* remedy.

In my view, however, there is no such bar. While the General Counsel has final authority over issuing and prosecuting complaints before the Board, the Board may find and remedy a violation not specifically alleged where the issue is closely connected to the complaint's subject matter and has been fully litigated. *Frito Co. v. NLRB*, 330 F.2d 458, 463–465 (9th Cir. 1964); *Pergament United Sales*, 296 NLRB 333, 334–335 (1989), enfd. 920 F.2d 130, 134–137 (2d Cir. 1990).

This includes situations where the litigated facts support a violation under a different section of the Act than that alleged in the complaint. *Pergament*, 296 NLRB at 334 fn. 6 (8(a)(4) refusal to hire found although only 8(a)(3) violation alleged); *AMC Air Conditioning*, 232 NLRB 283, 285–286 and fn. 11 (1977) (an 8(a)(1) discharge found although only an 8(a)(3) violation alleged); *Hughes Tool Co.,* 147 NLRB 1573, 1576–1577 (1964) (8(b)(2) and (3) refusal to process grievances found although only 8(b)(1)(A) violation alleged). It also includes situations where the litigated facts support an alternative theory of violation that is more limited than that plead but is encompassed within the complaint's broader theory. *Oklahoma Fixture Co.*, 333 NLRB 804, 809 (2001)(finding that employer was bound to a series of year-to-year renewals of 1975 multiemployer master agreement, notwithstanding that the General Counsel alleged broader theory that the employer was bound not only to terms of the 1975 agreement, but to a series of successor master agreements, through one negotiated in 1994).

Indeed, the Board, with court approval, has specifically applied this principle to find that a respondent employer unlawfully delayed reinstating strikers as economic strikers, even though the complaint only alleged discrimination against them as unfair labor practice strikers. *Rogers Mfg. Co.,* 197 NLRB 1264, 1269 (1972), enfd. 486 F.2d 644, 648 (6th Cir. 1973), cert. denied 416 U.S. 937 (1974). As the court of appeals stated in upholding the Board's decision, "'the Board has an obligation to decide material issues which have been fairly tried by the parties even though they have not been specifically pleaded.'" 486 F.2d at 648 (citations omitted).

Here, consistent with the above precedent, I find, based on the litigated facts, that the Respondent unlawfully failed to reinstate Henriquez as an economic striker under *Laidlaw*. Although the General Counsel did not allege this theory, and asserted only that Henriquez was an unfair labor striker, as in *Rogers* the material facts were litigated and clearly support a violation under a lesser included *Laidlaw* theory. Thus, the credited evidence established that there was a job opening and that Respondent lacked a basis to deny reinstatement to Henriquez.

My colleagues note that the General Counsel's exceptions did not include the issue of Henriquez' right of reinstatement based on his being an economic striker. However, the absence of an exception directly on point is not dispositive here. It is well established that the Board has "full authority over the remedial aspects of our decisions." *Allied General Services,* 329 NLRB 568, 569 (1999); *Schnadig Corp.,* 265 NLRB 147, 147 (1982). Indeed, we have specifically stated that "remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions." *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996). Here, as in *Schnadig Corp.,* it is clear that "the Respondent's unlawful conduct directly affected" Henriquez, and there is "no reason why we should not afford a remedy to any employees victimized by Respondent's unlawful conduct." 265 NLRB at 147–148. Like other cases that turn on the scope of exceptions, *FES,* 333 NLRB, supra (2001), cited by my colleagues, did not involve a remedial order but rather potential defenses—i.e., unlitigated fact and legal issues of threshold liability—that the respondent might have, but did not, raise.

My colleagues also assert that the Respondent was given no notice of any need to present a "further defense that would justify failing to offer immediate reinstatement to an economic striker, but would lack any legal merit as to an unfair labor practice striker." They presumably refer to an opportunity for the Respondent to show that there was no job opening for Henriquez in his capacity as an economic striker. That issue is academic,

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concerning the meeting at which Hicks questioned employees was "inconsistent."

however, because the evidence on record and the Respondent's own admissions clearly establish that there *was* an opening for him. The Respondent, by its own admission, "continued to grow rapidly during the strike, and "[f]ollowing the strike [i.e., as of June 7, 2000]" it had 17 employees in the unit. Further, the judge found, on May 31 the Respondent increased its projected immediate personnel requirements from 20 to 24 employees, effectively creating a total of seven vacant positions. Through July 10, the Respondent rehired five of the seven strikers it had permanently replaced, leaving two vacancies. In its brief, the Respondent states that these two positions did not go to the two remaining strikers on the alleged grounds that one had disappeared and the other (Henriquez) engaged in "strike misconduct"—which, as noted above, the judge found to be false. As in *Allied General Services,* "no material facts bearing on the appropriateness" of the remedial order to which Henriquez is entitled are unestablished. 329 NLRB 568 at 570.

Contrary to my colleagues' assertion, therefore, finding a *Laidlaw* violation would not deny the Respondent due process. Accordingly, consistent with the record evidence and the Board and court precedent cited above, I would find the violation.

3. Finally, while I agree with my colleagues that the Respondent did not violate Section 8(a)(1) by warning employees of the consequences of a union-led strike, I feel obliged to point out an apparent violation that was not litigated here.

The warning to employees was included in a written statement that was read aloud to employees at a mandatory meeting. In a preceding paragraph of the same statement, the Respondent stated as follows:

> If we can't get 6 votes, then *this matter* could continue on for months. *The NLRB would have to rule* on the challenged ballots and then the unfair labor practice charges. *All this litigation* would make it much more difficult to operate and service our customers over the summer. Obviously *this* would also *impact the job security of everyone* working at the facility." [Emphasis added.]

This paragraph would seem to be a threat of retaliation for using the processes of the Board and consequently a violation of Section 8(a)(4).

I do not believe that the Board condones such a threat here. The complaint allegations and the General Counsel's contentions at trial concerning the Respondent's statement were specifically confined to the warning of the consequences of a strike. Accordingly, although the above-quoted passage was included in the record, it was never put at issue in the case and the Respondent was given no opportunity to defend its legality. The Board therefore correctly does not address this issue.

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Jeffrey C. Kauffman, Esq., and *Joshua R. Van Kampen, Esq. (Seyfarth Shaw),* of Chicago, Illinois, for the Respondent-Employer.

John F. Ward, Esq,. and *David A. Iammartino, Esq. (Carmell Charone Widmer Mathews & Moss),* of Chicago, Illinois, for the Charging Party-Petitioner.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. Shortly after Charging Party Manufacturing, Production & Service Workers Union Local No. 24, I.U.A.N. & P.W., AFL–CIO (Union), began to organize the employees of Respondent Fantasia Fresh Juice Company, the complaint alleges, Respondent began a campaign to find out, threaten, and promise wage increases to those involved in union activities, in violation of the National Labor Relations Act, 1947, as amended, 29 U.S.C. Sec. 151 et seq. The employees then decided to strike and did so, allegedly in protest of these unfair labor practices. Respondent permanently replaced them. When their strike failed, they sought reinstatement; but Respondent refused to do so immediately, again, the complaint alleges, in violation of the Act. Indeed, because Respondent's violations were so serious, the complaint requests a bargaining order under the authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Respondent denies that it violated the Act in any manner.[1] It also denies that it committed any objectionable conduct that would warrant the setting aside of the Board-conducted election that was held on June 2, 2000.[2]

At all material times, Respondent, an Illinois corporation, with an office and place of business located in Rosemont, Illinois, has been engaged in the manufacturing and distribution of freshly squeezed juices, smoothies,[3] and nutritional drinks. During 1999 Respondent derived gross revenues in excess of $500,000 and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside Illinois. I conclude that Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. I also conclude that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The witnesses could agree on almost nothing, not even on when the Union made a demand for recognition. Mark Spano, the secretary-treasurer and organizing director of the Central States Joint Board, which oversees the Union, testified that his first call to Respondent was on April 28, whereas Brad Barnhorn, Respondent's CEO, testified that Spano first called on April 24.

[1] This case was tried in Chicago, Illinois on September 11–14, 2000. The charge was filed by the Union on May 2, 2000, and amended on May 9 and June 9, 2000. The complaint issued on June 28, 2000.

[2] All dates are in 2000, unless otherwise indicated.

[3] Smoothies are whole fruit drinks—strawberries, bananas, fresh squeezed orange juice, apple juice—blended together and packaged.

Barnhorn's narration seems more probable. In early April employee Armando Ortiz first contacted union organizer—Business Agent Horacio Vazquez and met with him on Friday, April 21, together with two other employees, Ricky Gonzales and Adalberto Zacarias, during which meeting the three signed authorization cards. Vazquez gave Ortiz blank cards, which he had signed by all except one of the remaining production employees: four employees the next day, April 22, Brooks, Lorenzo Silva, Simeon Henriquez, and David Ruiz; and two employees on Monday, April 24, Howard Jones and Gamaliel Alameda. What followed is in dispute. Vazquez testified that he and John McDonough, another business agent, met on Wednesday, April 26, with the production employees, all except Brooks, who had signed a card, and Thai Vu, who had not, and that they discussed employee problems and concerns with Respondent, union benefits, and other union-related business.

Despite the fact that Ortiz was at that meeting, Vazquez testified that he did not receive the six cards until Friday, April 28, after which he and McDonough gave them to Spano; and on that day, before noon, Spano called Respondent and spoke to Barnhorn, informed him that he possessed signed authorization cards from a majority of Respondent's employees, and asked Barnhorn to voluntarily recognize the Union as the production employees' exclusive collective-bargaining representative. Barnhorn said that he needed to speak to President Tom Hicks and took Spano's telephone number. In mid-afternoon, Hicks called Spano, who again demanded voluntary recognition; but Hicks declined, while agreeing to have a card check. Hicks would call back on Monday to set up the meeting; but on Monday, May 1, Hicks called to announce that he was not going to agree to the card check and Spano should do whatever he had to. The petition was filed the next day, May 2.

That is the Union's story. Respondent's is quite different. It starts on April 24, the day by which Ortiz had obtained six more cards, so the Union had 9 out of 10 cards, a clear majority. But, according to Vazquez, Ortiz did not deliver his cards to the Union that day, or the day of the meeting 2 days later, and not until Friday. Not only was that delay unexplained, and particularly the fact that Ortiz was at the Wednesday meeting, yet did not turn in the cards. Also unexplained was the fact that Vazquez had a meeting at all. He had convinced 90 percent of the employees to designate the Union as their representative, yet he was supposedly talking to these same employees, who had signed cards, about union benefits. I find this sequence odd and do not credit it. It seems more probable that, having obtained a majority on Monday, the Union would have demanded recognition that day, instead of waiting until Friday. Thus, I believe Barnhorn's testimony that the first time he was contacted by the Union was Monday, when Spano called to announce that a majority of Respondent's employees had signed union cards and that he wanted to meet. Barnhorn told Spano he had no idea who Spano was and, to test the legitimacy of Spano's demand, asked if he knew how many employees worked for Respondent and whether he could name one employee. Spano refused to answer. Barnhorn took down Spano's telephone number, but said that, although he had no authority to recognize the Union, he would call Spano back.

Instead, Barnhorn gave Spano's number to Hicks, who called Spano without success, but left his number. Spano called back later, again stating he had signed cards for the production employees and asking for recognition. Hicks declined; and Spano then asked whether Hicks would agree to a meeting and a card check, to which Hicks responded that he had no problem meeting but was not sure what a card check was. They spoke again on Thursday, April 27. Hicks said that he had consulted with an attorney, who advised not to meet with Spano. Spano angrily ("so that's how you fucking want to play it") ended the conversation.

What transpired before Friday, April 28 is important to understanding what happened that day, because the complaint alleges that, as a result of Spano's telephonic demand that day, a demand that I have found was made earlier in the week, Respondent interrogated and threatened the employees. The General Counsel's proof is as follows: Between 11 a.m. and 1 p.m., Barnhorn asked Zacarias if he knew anything about the Union. Zacarias responded that he did not know what Barnhorn was talking about. Barnhorn said that that morning (thus corroborating Spano's testimony that he called that day) he had received a call from a union representative who had 11 cards, to which Zacarias said that he did not know why Barnhorn was telling him 11 cards, because there were only 10 people working there. Barnhorn said "then you know who is the union leader," but Zacarias said that he did not. Barnhorn said that, if he knew who the union leader was, he would fire the leader, adding that the Union was "bullshit" and that the only thing that the Union wanted was their money. Barnhorn kept repeating that he could not believe that he needed "bullshit" at the company and, at the end of the conversation, Barnhorn told Zacarias to tell his friends that there was going to be an employee meeting at the end of the shift that day.

There was a meeting that afternoon, lasting 2 hours, with all the production employees, except Ortiz and Gonzales; and Barnhorn, Hicks, and the new (2 weeks) plant manager, Jaime Wentworth. Hicks asked Zacarias, who needed a translator when he testified at the hearing, to translate the meeting in Spanish for the Spanish-speaking employees, a job normally assigned to Gonzales, and, according to the employees, asked each employee, one-by-one, who wanted the Union, why they wanted the Union (according to Ruiz, "how come we wanted the union if we had good benefits in the company"), and who was the leader of the Union. None of the employees provided Respondent with a definitive answer, each stating that they did not know what Barnhorn was talking about and that they had never worked with a union.

Hicks also spoke, writing on the dry erase board what the employees would have to pay the Union in dues and comparing that with the money that they could use instead to invest in their 401(k) plans which would appreciate in value. Barnhorn, according to Zacarias, repeated his earlier curses, that what the employees were doing was "bullshit," and added that he was never going to sit down and negotiate with the Union, statements that were not corroborated by anyone who attended that meeting. Nor did any other witness corroborate the use of "bullshit," which Barnhorn and Hicks insisted was part of Zacarias's normal language. On the other hand, Hicks admitted that

that Respondent wanted to find out what the employees' knowledge about the Union was and that he asked the group if they had ever been in a union and what they knew about it. The intent of the meeting, according to him and Barnhorn, had been to explain to the employees all their benefits, which they believed the employees, such as Zacarias, did not understand prior to seeking the Union's aid. In any event, only one employee, Brooks, indicated that he had worked in a union shop before; and Hicks testified that he specifically started asking Brooks about his feelings concerning unions and what was good or bad about them. Brooks was called as a witness by Respondent but was never asked about the meeting and so did not corroborate what Hicks testified to.

In any event, Respondent's different perspective of the meeting stems from Barnhorn's different recollection about how it came about. He testified that he met Zacarias in the hall by chance that morning and, after exchanging pleasantries, Zacarias asked him in English about a raise. Barnhorn suggested they talk about it in private and summoned Wentworth to meet with them. Barnhorn apologized for not having met with Zacarias earlier and understood from Mike Suchetti, Wentworth's predecessor, who had been terminated at the end of March, that Zacarias was due a raise in 6 months. (That raise would come due on May 1.) Barnhorn said that he understood he was promised a raise of either 50 or 75 cents and agreed to honor that promise, but he had just been contacted by a union and he did not know whether or not he could lawfully give a raise at that point. Zacarias said that he did not need a union, to which Barnhorn responded that if everything was business as usual, he would have no problem; but, as of then, he did not know what to do. Zacarias responded with "fuck the union" and added that Suchetti had promised him bonuses. Barnhorn asked whether he was participating in Respondent's 401(k) plan, and Zacarias seemed not to know what Barnhorn was referring to. Barnhorn promised to work out Zacarias's request as soon as possible, adding that it appeared that Zacarias did not favor having a union and telling him that he had the right to tell that to the other employees.

Based on his conversation with Zacarias, Barnhorn (so he testified, but I find that the meeting was in obvious response to the Union's demand for recognition) realized that the employees did not fully understand what was in their current benefit package, told Hicks, and decided to call an employee meeting to explain the benefits package, which Barnhorn scheduled later that same day, because he had to leave the next day for California to plan his upcoming wedding. And so the employees, except Ortiz and Gonzales, met with Hicks, Barnhorn, and Wentworth. Barnhorn began by dealing with the replacement of Suchetti by Wentworth and attempting to explain how that affected the work that the employees were being asked to perform and to describe some of the benefits that Respondent provided. He then explained the 401(k) plan and found out that, of all the employees, only Brooks was participating, confirming Barnhorn's suspicion that the employees might not have fully understood what benefits Respondent was providing. Barnhorn next described Respondent's profit-sharing plan and explained that 10 percent of Respondent's profits would be shared with the employees.[4]

Barnhorn then turned to the Union organizing campaign, said that he had been contacted by the Union, and stated that the employees' decision to have a union was serious and he wanted them to understand what benefits they presently had. Hicks then spoke, asking whether each employee had ever been a member of a union. Only Brooks answered that he had; and, in response to Hicks' question of how that experience had been, Brooks stated that he felt he was paid more money, but that he also had to pay union dues and did not think he got anything back from the dues. Barnhorn then explained that a union might represent the employees and try to do the best it could, but the union did not run Respondent. The union could not promise to deliver; and, if it did, the employees should be sure to get those promises written. He then returned to the 401(k) plan and, on the board, compared its benefits with the amounts that the employees would spend on dues to the union. When an employee also asked about the reason that they worked more hours on certain days and less on others, Barnhorn explained that Monday and Tuesday were big production days because that production goes to the large markets of Minneapolis and Madison and advised the employees what hours they could expect to work on each day of the week. He ended the meeting by expressing his hopes that everyone understood better who Respondent is and how it performs its business, so that they can make an informed judgment about having a union.

What happened the next day, April 29, is also sharply at issue. According to Gonzales, at around noon, Hicks walked into the cooler, where Gonzales and Ruiz were working and asked if Gonzales knew anything about the Union, to which he answered no. Hicks asked had he worked with the Union before, and Gonzales again said no. Then Hicks asked who was the leader of the Union and how many people were involved; and Gonzales answered that he did not know what is going on, how many were involved, and what Hicks was talking about. Hicks then offered Gonzales a 50-cent-an-hour increase and 1 extra vacation week to vote against the Union. Hicks received a telephone call and had to leave, but he came back an hour later and repeated the same promise. He added that Gonzales was "to convince all my friends, all Mexican guys to vote against the Union. So, the two black guys . . . voted with the Union, so he could fire them." Wentworth came in and asked whether he had considered what Hicks had talked about, and Gonzales said that he had not. Then Wentworth said that he would put it in different words, that instead of paying $60 to the Union, he could invest that $60 in the 401(k) plan. Wentworth and Hicks left, Hicks, saying "that we were a bunch of ignorants."

Ruiz was asked to corroborate these conversations. He testified that, because he was working, he only heard Hicks ask Gonzales how it was that he wanted the union, that the union was not going to benefit him, and if he knew who wanted the

[4] One of the Union's principal contentions is that the 401(k) and profit-sharing plans were newly announced in response to the Union's demand for recognition. That is not, as the Union concedes, an allegation of the complaint, is not urged as a violation of the Act by the General Counsel, and was not fully litigated or briefed by Respondent.

union and why. But Gonzales testified that he told Ruiz about both conversations. As to Gonzales's first conversation, Ruiz remembered only that Gonzales "told me that Mr. Tom had asked him about the union. That he should leave that alone because that was not going to do him any good. And he shouldn't worry about the union." As to the second conversation, Ruiz testified that Gonzales

> told me that Tom asked him what have you thought about the union. He also told me that he told him to vote against the union. He was going to give him a 50 cent raise and an extra week of vacation if he voted against the union because he tried to convince us, the Mexicans, that we should vote against the union. So that way, the two Negroes would vote, that the two Negroes would vote for the union. And that way he could fire them.

Respondent's witnesses denied almost all of this testimony. According to Hicks, he asked Wentworth to explain the benefits package to Gonzales and Ortiz, neither of whom had attended the meeting, and Wentworth did so, particularly about 401(k) plan. While they were talking, Hicks came into the cooler, ensured that Wentworth was following his directions, and then asked Gonzales "to help us translate this and get this communicated to the rest of the people," to which Gonzales agreed.

There was one additional alleged unfair labor practice before the evening of May 2, when the employees met at the Union office and allegedly voted for a strike. According to Henriquez, on May 1, Hicks told him that he would give him a 50-cent raise and an extra week of vacation to vote no for the Union. Henriquez said that he did not know what Hicks was talking about. Hicks then asked Henriquez to tell him who the leader of the Union was and which employee was responsible for the Union; but Henriquez said that he had no knowledge of the union situation. Hicks denied that he had any such conversation with Henriquez.

This is primarily a credibility case, and the General Counsel has the burden to prove the allegations of the complaint by a preponderance of the evidence. There is no way to reconcile the completely different and consistently antithetical recollections of the witnesses for both sides. Furthermore, not one witness's testimony was wholly adequate. In considering the differing recollections of the witnesses, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. The standard guide for determining credibility, which I have followed, is to take into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. See generally *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

I found Henriquez to be thoroughly unreliable. His testimony that Hicks was going to tell the Union to fire the employees for bothering Respondent was improbable. According to Henriquez, Barnhorn said "that the union would come, that we shouldn't tell them anything. They were going to tell the union people to fire us." At another point of his testimony, he attributed to Barnhorn: "He was going to tell the union people that we were bothering them a lot, so they would fire us" and, to Hicks, "if we say something to them, they were going to tell something to the Union people that we were bothering them so the Union will fire us." He could not understand the questions put to him. His answers indicated general confusion. His recollections of events appeared minimal. I do not credit him at all and particularly note that he never repeated to any other employee the interrogation and the offer of an increase. In fact, at the union meeting on May 2, according to Vazquez, Henriquez said that he was threatened that "he was going to get fired if they knew he was the head of the Union," an allegation that Henriquez never made in his testimony. No one else testified that Henriquez made that statement, and I thus do not believe Vazquez, either.

I recognize that Zacarias and Gonzales testified to offers similar or identical to that which Henriquez testified. Often that might be persuasive in finding a violation. Here, however, there was not much corroboration of any of these offers.[5] Although Gonzales may have told Ruiz about the offer of the raise and the additional week of vacation, when the employees met on May 2 to discuss what had happened in the prior week and ultimately decided to strike, neither Zacarias nor Gonzales nor Henriquez testified that he told the other employees that he was made these offers, and none of the other employees and none of the union representatives testified that the three employees made mention of these offers. In addition, as will be seen, Zacarias confirmed that he brought up the issue of Suchetti's promise of a raise with Hicks, not on April 28 as Hicks had testified, but on the evening of the first day of the strike, May 3, thus partially supporting Hicks' testimony about the nature of the increase that they were talking about, not to influence the result of the election but to live up to the promise that had been made to Zacarias when he was hired. On May 4, the second day of the strike, Zacarias reported to Ruiz only that he had met with Hicks the previous night and that Hicks had asked him to go back to work and to forget about the strike and the other employees, who "were not going to go back anymore," an allegation that was not part of Zacarias's testimony on direct examination. Zacarias did not tell Ruiz anything else about which he testified at the hearing: that Hicks offered Zacarias an immediate raise of 75 cents to $1 raise and an additional $1 raise in about 2 months if he went back to work the following day; that Hicks threatened that Respondent would never sit down and negotiate with the Union: and that, if Zacarias remained on strike

[5] The Union contends that Respondent must have made these promises because its payroll records show that Vu, who crossed the picket line and returned to work, was granted an hourly increase of 50 cents starting the payroll period ending May 28. That was not effective, contrary to the Union's brief, "upon his crossing" the picket line, but at least a week later. No increases were given to either Jones or Brooks, who also returned to work. Vu was one of the lowest paid employees and had not received an increase since he was first hired. Respondent's payroll records show that other employees, including the ones who claim that these promises were made, received increases, similar to Vu's, in January, so Vu's increase is not out of the ordinary. Finally, there is no showing that Vu was also granted an additional week's vacation.

and later returned to work, working conditions would not be the same because Respondent would not trust and respect him.

The testimony of Zacarias was generally unreliable concerning the increase that he asked for. Rather, it appears that he was interested in obtaining the increase that had been promised to him by Suchetti and that, after the first full day of the strike, he returned to Respondent's facility on May 3 with his wife and a friend to translate for him to obtain not only that original increase but more. Zacarias reminded Barnhorn of Zacarias' promise to give him a raise after 6 months. Barnhorn said that, if Suchetti had promised Zacarias a 75-cent raise, that was in place. Zacarias then said that Wentworth had promised him a dollar. Hicks doubted that and went to get Wentworth, who returned with Hicks and said that he had made no such promise. Then Zacarias asked for healthcare coverage for his family at Respondent's expense, and Barnhorn told him that Respondent would not do that. Finally, Zacarias insisted that Suchetti had promised him a $1000 bonus every 6 months. Barnhorn explained that that was a reason that Suchetti had been fired, that he did not know all the promises that Suchetti had made, and Respondent could not do that. I find Respondent's explanation of its conversations cogent and detailed, credit them, and discredit Zacarias. I dismiss the allegations of the complaint involving him.

Finally, I find remarkable the similarity of the testimony of Henriquez and Gonzales to the effect that Respondent's wage increases and added vacations were given to them to affect their vote (vote no) against the Union when the Union's petition for a representation election had either not been filed or, clearly, Respondent had not received the petition, which was filed on May 2, the same day as the unfair labor practice charge was filed, which was mailed by the Regional Office on May 4 and received by Respondent on May 6.[6] I conclude, therefore, that there is no credible proof that any unlawful offer of wage increases or additional benefits was made to any of the three employees and conclude that Respondent did not violate the Act in that respect.

One of the Union's objections to the election suffers from the same lack of corroboration. For example, Gonzales accused Hicks of the violation of seeking to convince the Spanish-speaking employees to join a cabal against the Union, leaving the African-Americans as the sole supporters of the Union so that Hicks could fire them. Quite frankly, I found that testimony rather astounding when I first heard Gonzales testify to it. In fact, his allegation gained more support when Hicks, who denied this with great fervor, was confronted on cross-examination with a memorandum showing that there had been a conflict among the employees described as "cultural/ethnic/language," which Hicks weakly and unbelievably opined was solely a difficulty of understanding what the employees were saying. Rather, the objection could have validity as an attempt by Respondent to take advantage of the racial discord in the facility (there had been some use of the "n" word.) Ruiz did confirm that Gonzales told him of this statement shortly after it was allegedly uttered.

The only other person who allegedly heard of the statement was, according to Gonzales, Brooks, an African American, who, Gonzales testified, asked him if he was "going to do what Tom said." Gonzales asked him what, and Brooks replied: "[T]elling all the Mexican guys to vote against the Union so he could fire us." Brooks vehemently denied that any such conversation took place. No one else, not the employees, and not the Union representatives testified to it being mentioned, despite Gonzales's testimony that he told the other employees at the May 2 prestrike meeting. Although there was corroboration from Ruiz, I find this incident difficult to believe, particularly because Respondent thought so highly of Brooks that he had been made a supervisor earlier, but had been removed as a result of the complaint of the employees, mostly those who were Spanish-speaking. Even in this proceeding, the Union contends in its challenges that Brooks was a supervisor; and so it is unlikely that Hicks would have threatened to discharge the two African Americans, one of whom it so trusted.

There remains a number of alleged interrogations and threats. Regarding the former, I find that the questions asked of the employees were consistent with the testimony of Barnhorn and Hicks, that they asked only whether the employees had been members of a union in order to compare that experience with the benefits already afforded by Respondent and that they did not ask who started the organization drive. I do not find that coercive under *Westwood Health Care Center*, 330 NLRB 935, 939–940 (2000); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). I find that Ruiz' testimony as a whole did not corroborate Zacarias' and Henriquez's allegations that they were asked who the leader of the Union was. Rather, Ruiz testified inconsistently in a number of ways. First, he testified that Hicks asked: "how come you want a union and what do you want?" However, later in his examination, Ruiz recalled the question differently: "how come we wanted the union if we had good benefits in the company." Then he testified: "He wanted to know inside that group who were more interested in it. He wanted to know who was organizing the union." Then he testified: "He was asking who is it, how come you want the union." At first, Ruiz testified that he responded: "I didn't have any idea what he was talking about. That I didn't know what the union was since I never worked with one." Then he testified: "They all answered the same as, the way I answered it. We had never worked with a union before." When asked whether it was true that he was being asked whether he wanted a union, his response was that "I don't know what they're, what they were talking about." Considering these inconsistent answers, at least one of which was consistent with Barnhorn's and Hicks' testimony that the employees were asked only if they had been members of a union before, the last admission that Ruiz did not comprehend what was being said, and the otherwise unsatisfactory testimony, I do not find unlawful interrogation or polling, as alleged in the complaint. Furthermore, although I received in evidence the precomplaint investigatory affidavit of Ortiz given to the Regional Office, I give it no weight and find no unfair labor practice, the only

[6] Had Hicks agreed to a card check on April 28, as Spano testified, he would have had no reason to offer an increase to affect his employees' votes.

purpose for which the affidavit was offered. It is uncorroborated hearsay.

As stated above, this is a *Gissel* case. After careful review of the record, I find that there are so many problems with the testimony presented by the witnesses for the General Counsel that I cannot believe them, and I accept the logical and not improbable testimony and the specific denials of Barnhorn, Hicks, Wentworth, and the other witnesses presented by Respondent. Testimony in contradiction to their testimony has been carefully considered but discredited. That being said, Respondent did not commit any violations of the Act, no bargaining order is warranted, and I would normally not feel it necessary to detail the meeting at which the General Counsel contends that the employees voted to strike. But it is important to consider that meeting because of the credibility problems raised in this proceeding and in the event that, if exceptions are filed, the Board finds that Respondent violated the Act. A meeting of all the production employees, except Brooks and Vu, was held on May 2. Henriquez, Gonzales, and Ruiz each testified that the employees complained about conduct by Respondent, Vazquez said the conduct was illegal because it was an unfair labor practice, and the employees voted to strike by raising their hands.

There are a variety of problems with the believability of this testimony. Jones, the only witness who had no stake in the result of this proceeding, although confirming that Vazquez mentioned the term "unfair labor practice," testified that no vote was taken. In addition, only one purpose of a strike was mentioned by Vazquez. On April 26, Vazquez said, "If the company doesn't come to terms with the Union we may be forced to strike." At the meeting on May 2, Vazquez said: "He gave Tom [Hicks] a call and Tom didn't want to come to terms with the Union. So he wants to strike." On the picket line the next day, Vazquez "spoke about tactics in which they use to get the company to come to terms with the Union." Vazquez did not on the General Counsel's rebuttal case deny Jones' testimony. In addition, Vazquez' recollection of what happened at the May 2 meeting—that, after being told of Respondent's unfair labor practices, he told the employees that "the Union would file charges against the company"—was inconsistent with the fact that the Union had filed charges earlier that same day, before the evening meeting. I credit Jones, and I find that Vazquez and the employees attempted to justify an ill-conceived and unsuccessful strike by trying to make it appear as if they were conducting an unfair labor practice strike, when in fact they were attempting to force Respondent to recognize the Union. *Concord Motel*, 298 NLRB 1096, 1096 fn. 1 (1990).

The strike began on May 3, with most of the employees carrying or posting signs that read that Respondent was "Unfair to Union labor Local 24 AFL–CIO." Respondent began hiring permanent replacements. On Friday, May 5, Hicks came out to the picket line, flanked by two policemen, and read in English from a written statement that, effective that day, Alameda, Henriquez, and Ruiz were permanently replaced. The letter was orally translated into Spanish. Respondent's counsel sent to the Union on the same day a letter containing the same information that had been read to the picketers. Respondent followed the same routine in permanently replacing Gonzales and Ortiz on Monday, May 8, and Zacarias, Silva, and Brooks on Thursday, May 11. An employer does not discharge an economic striker simply by advising him that it has hired a permanent replacement to fill his position. *Chromalloy American Corp.*, 286 NLRB 871, 872 (1987), enforcement denied on other grounds, 873 F.2d 1150 (8th Cir. 1989). Respondent had the right to replace these economic strikers permanently. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346 (1938). I conclude that Respondent did not violate the Act by permanently replacing the strikers and dismiss this allegation.

On May 31, Respondent held a mandatory meeting with its production employees, almost all of whom were recently hired. A statement was read by attorney Yolanda Haces,[7] containing the following language, which is quoted by the General Counsel (with additions by me to ensure the accuracy of the quotations) to support his claim that Respondent violated the Act:

> If we can't get 6 votes, then this matter could continue on for months. The NLRB would have to rule on the challenged ballots and then the unfair labor practice charges. All this litigation would make it much more difficult to operate and service our customers over the summer. Obviously this would also impact the job security of everyone working at the facility.
>
> This Union activity hasn't benefitted [sic] anyone that we can see. Even if the Union represented the employees, it cannot guarantee employees that it will get them any increase in wages or benefits. All the Company would need to do is sit down and negotiate with the Union, but the Union cannot force the Company to agree to anything. If the Company and the Union can't agree on a contract, then the Union obviously can strike. You've already seen what happens to employees when a union strikes. Employees lose wages, they lose company-paid benefits, they're ineligible for unemployment compensation, they can be permanently replaced and it makes it very difficult and expensive for the Company to service its customers.
>
> Unfortunately, a "YES" vote will mean that the Union could continue to play its funny little games here at Fantasia Fruit. But, we don't think anyone has had much *fun* over the last month. The employees, their job security and our customers would all be much better off if the Union loses the election on June 2.
>
> . . . .
>
> If you have enjoyed working at Fantasia, the best thing for you to do would be to support the Company by voting "NO"- by voting against the Union. [Emphasis in original.]

The complaint alleges that the speech threatened employees with discharge, loss of wages and benefits, and with permanent replacement because of their union activities. I disagree. The

[7] Hicks was not being candid when testifying to the Haces speech, when he first stated that she was to share what "[w]e had prepared . . . her to say." Despite the fact that he had left the room, he then stated: "She kind of put it aside and had more of a discussion with the employees about the company. I think she read a couple of the points and that was it." That was obviously not true. The parties stipulated that she read the document word for word in its entirety.

speech sets forth an accurate description of the realities of an economic strike. It contains no threat of a discharge. The loss of wages and benefits is a natural result of the withdrawal of services. As noted above, Respondent was entitled to replace economic strikers permanently. I conclude that the speech does not violate the Act.

On June 7, Vazquez, on behalf of all the strikers, faxed a letter to Respondent unconditionally offering to return to work. The next day, June 8, Vazquez, McDonough, and six of the striking employees went to Respondent's facility and personally reiterated the unconditional offer. Hicks admitted receiving the letter, but said that Respondent could not take the strikers back because it prepared its schedules 2 weeks in advance, but would call them back as soon as possible. Respondent called back most of the strikers, who returned on the following days: Silva, June 12; Zacarias, June 19; Gonzales and Ruiz, July 8; and Alameda, July 10. No one can find Ortiz, and Respondent declined to offer Henriquez reinstatement on the ground that, about 2 weeks after the strike commenced he held in his hand a large rock, the size of a softball, as if to throw it through Wentworth's windshield.[8] This is not a *Laidlaw*[9] case. The premise of the complaint is that the employees were protesting Respondent's commission of unfair labor practices, none of which I have found. There is no evidence, and the General Counsel does not contend, that the strike was ever converted to an unfair labor practice strike. Accordingly, by not reinstating the strikers immediately, Respondent did not violate Section 8(a)(3) and (1) of the Act. I will dismiss this allegation.

The Objections and Challenges

On May 23, the Regional Director for Region 13 issued a decision and direction of election describing the appropriate bargaining unit as all full-time and regular part-time production employees employed by Respondent at its Rosemont, Illinois facility. The election held on June 2, 2000 was inconclusive, the tally being 7 votes for the Union, 7 votes against it, and 16 determinative challenges. Almost all of the Union's objections mirror the allegations of the unfair labor practice complaint. Because I have concluded that Respondent did not violate the Act in any manner, I dismiss those objections, as well as objection 8, which is based on racial appeals. I also dismiss, as unsupported by any evidence, objections 5 and 6 that Respondent called the police and threatened to arrest the strikers and threatened employees that it would do whatever it takes to prevent them from obtaining union representation. To the extent that objection 5 complains that Respondent did something wrong by arranging for police protection, given the threat made to Brooks by an unidentified person in front of his home, the telephone threat to Vu, the four slashed tires on Vu's car, Respondent's missing production tools, such as knives, thermometers, and razor blades, and the sabotaging of Respondent's labeling machine, police protection was warranted.

The Union objects, however, to the validity of Respondent's *Excelsior*[10] list, because Respondent omitted from the list the seven strike replacements. In *Woodman's Food Markets*, 332 NLRB No. 48 (2000), which involved the omission of 12 eligible employees from the *Excelsior* list where the union lost the election by 13 votes, the Board reconfirmed that "employees have a Section 7 right to make a 'fully-informed' choice in an election, and . . . the purpose of the *Excelsior* rule is to protect that right," quoting from *Thiele Industries*, 325 NLRB 1122 (1998), and held that:

> in determining whether an employer has substantially complied with the *Excelsior* requirements, the Board must consider not only the number of names omitted from the *Excelsior* list as a percentage of the electorate, but also other factors, including the potential prejudicial effect on the election as reflected by whether the omissions involve a determinative number of voters and the employer's reasons for omitting the names.

The seven employees who were omitted constituted 23 percent of the eligible voters. The names were left off the list deliberately, and in spite of the Regional Director's denial on May 23 of Respondent's motion[11] to permit it to omit those names and to make alternate arrangements for the Union to have access to the employees. Respondent's bad faith precludes a finding that Respondent was in substantial compliance with the *Excelsior* rule. *Bear Truss, Inc.*, 325 NLRB 1162, 1162 fn. 3 (1998). In addition, Respondent did not even supply the names and addresses of nine other newly hired employees until three days before the election. The omissions involve a determinative number of voters. I sustain the Union's objection 1.

Respondent also objected to the results of the election in the event that the Union won. I am not persuaded that either of Respondent's objections have merit. Vu testified that he had to pass some people whom he identified as union business agents in order to vote, but there was neither electioneering going on nor did these people say anything nor was it really shown that they were in the wrong place. Respondent also alleges that, during the preelection period, the Union threatened Vu on the phone and slashed all four of the tires on Vu's car and that Brooks was threatened by an unidentified person in front of his home. Although I have no doubt that these particular acts occurred, Respondent did not prove that the Union played any role in the threats or vandalism. Lacking that proof, I dismiss Respondent's objections.

The ballots of the seven strike replacements, Julio Garcia, Enrique Cebrero, Gustavo Torres, Manuel Diaz, Jose Gomez, Adan Galeana, and Noe Escalora were challenged. Permanent replacements of economic strikers may vote, if they are otherwise eligible. *Akron Engraving Co.*, 170 NLRB 232, 233 (1968). To be eligible to vote, the employees must be in the unit on the established eligibility date and in employee status, hired and working, on the date of the election. *Plymouth Tow-*

[8] The incident was never reported to the police, who were in attendance at the picket line at all times. Respondent never notified Henriquez that it had terminated him. I find that this incident never happened. There were in the area no rocks which Henriquez could have picked up to throw, and he would have been stupid to do so in front of and in clear view of the police.

[9] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[10] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[11] Fn. 4 of her Decision and Direction of Election.

ing Co., 178 NLRB 651, 651 (1969). They were. The challenges are overruled.

The Union challenged the ballots of seven employees whom Respondent newly hired following the strike: Ramon Chavez, Raul Rosas, Manuel Galeana, Rizolino Mangalindan, Jose Solano, Bernardo Bravo, and Felix Rios. The Union does not dispute that these employees were hired as of the May 20 eligibility cutoff date, nor does the Union dispute that all seven employees were working as of May 20. The record so demonstrates, and the employees would normally be eligible to vote. Ibid.

The Union contends, however, that Respondent hired the new employees not for legitimate business reasons, but instead to "pack" the unit to improve its chances in the election. Respondent's sales have doubled each year since its inception, exceeding its own optimistic sales projections; and production increased during the strike. Its sales growth continued in May, due to its significant university market share. Its hiring of new employees was consistent with projections that it published on January 28, in which it projected the need for 20 employees in 2000. That projection was updated on May 31 to 24 employees. In a memorandum, dated March 30, Barnhorn reported to Hicks that "we are currently understaffed by probably 4-5 people and already working long work days" and that "[o]ur target is to build the team to 15+ members by late Spring if at all possible." Respondent told its current employees how "badly" it needed new employees, and Respondent hired five new employees after the eligibility cutoff date, in addition to reinstating five of the strikers. The Union did not meet its burden to "establish by a preponderance of the evidence that Respondent's action in [undertaking the hiring] . . . was for reasons proscribed by the Act." *Supermarket of Dunbar*, 178 NLRB 206, 206 (1969). I further conclude that Respondent had legitimate, nondiscriminatory reasons to hire the seven employees and find that the seven were eligible voters. Ibid. The challenges are overruled.

The Union challenges the ballot of Brooks on the ground that he is a supervisor. He may have been at one time, but most of the employees objected to his performance, and he was removed from his position on March 30, long before the election. Although by reason of his greater familiarity with all of the manufacturing processes employed by Respondent he may have trained, counseled, instructed, and advised employees, and although from time to time he may have relayed assignments and other directions, there is no credible evidence in this record that he had any authority which would bring him within the scope of the Act's definition of supervisor in Section 2(11). Some employees tried to inflate what Brooks did; but, when the employees were trying to organize, there was no objection to his attendance at the April 28 meeting as an employee and no contention that he should not have been given an authorization card to sign, as he was. He earned $11 per hour, perhaps 50 cents more than the average employee was paid, and received overtime and all the other benefits that employees were given. He was an employee, and the challenge is overruled.

The Union challenges the ballot of Roy Villegas, the part-time mechanic, who maintained and did troubleshooting of Respondent's equipment primarily at night when the other employees were not working. He earned $20 per hour, compared with the average employee who was paid $10.50 per hour. The agreed-upon unit includes only production employees. It does not include maintenance employees. Respondent did not even include Villegas on its first *Excelsior* list. I conclude that he was not a valid voter and sustain the challenge.

The representation proceeding is remanded to the Regional Director to take such further action as she deems necessary, in consideration of my rulings on the objections to the election and the challenges, including the opening and counting of the ballots, preparing and serving on the parties a revised tally of ballots and, if the Union is successful, issuing the appropriate certification. In the event that the revised tally shows that the Union is not successful, then a second election shall be directed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The proceedings in Case 13–RC–20319 are hereby severed and remanded to the Regional Director of Region 13 to take such further appropriate action as is consistent with this Decision.

IT IS FURTHER ORDERED that the complaint in Case 13–CA–38526 is dismissed.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.